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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 REBECCA ALLISON GORDON, JANET
12 AMELIA ADAMS and AMERICAN CIVIL
LIBERTIES UNION FOUNDATION OF
13 NORTHERN CALIFORNIA,

14 Plaintiffs,

15 v.

16 FEDERAL BUREAU OF
INVESTIGATION, UNITED STATES
17 DEPARTMENT OF JUSTICE and
TRANSPORTATION SECURITY
18 ADMINISTRATION,

19 Defendants.
20 _____/

No. C 03-01779 CRB

ORDER

21 In this Freedom of Information Act (“FOIA”) action plaintiffs seek records regarding
22 “no fly” and other transportation watch lists, as well as agency records concerning plaintiffs
23 Rebecca Gordon and Janet Adams. Now pending are the parties’ cross-motions for summary
24 judgment. In light of the nature of the government’s claimed exemptions, the Court directed
25 the government to produce copies of all withheld records for the Court’s review.

LEGAL STANDARD

26 “FOIA entitles private citizens to access government records.” Minier v. Central
27 Intelligence Agency, 88 F.3d 796, 800 (9th Cir. 1996). “The Supreme Court has interpreted
28 the

1 disclosure provisions broadly, noting that the act was animated by a ‘philosophy of full
2 agency disclosure.’” Lion Raisins v. U.S. Dept. of Agriculture, 354 F.3d 1072, 1079 (9th
3 Cir. 2004) (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989)). FOIA
4 contains nine exemptions, however, which a government agency may invoke to protect
5 certain documents from public disclosure.” See id. (citing 5 U.S.C. § 552(b)). “Unlike the
6 disclosure provisions of FOIA, its statutory exemptions ‘must be narrowly construed.’” Lion
7 Raisins, 334 F.3d at 1079 (internal quotation and citation omitted).

8 The agencies resisting public disclosure--here, the FBI and TSA-- have “the burden of
9 proving the applicability of an exception.” Minier, 88 F.3d at 800. That burden remains with
10 the agency when it seeks to justify the redaction of identifying information in a particular
11 document as well as when it seeks to withhold an entire document.” United States Dept. of
12 State v. Ray, 502 U.S. 164, 173 (1991). An agency “may meet its burden by submitting a
13 detailed affidavit showing that the information ‘logically falls within the claimed
14 exemptions.’” Id. (internal citation omitted). “In evaluating a claim for exemption, a district
15 court must accord ‘substantial weight’ to [agency] affidavits, provided the justifications for
16 nondisclosure ‘are not controverted by contrary evidence in the record or by evidence of
17 [agency] bad faith.’” Id. (quoting Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992)).

18 DISCUSSION

19 The Court has begun the process of reviewing each piece of withheld information to
20 determine if the defendants have met their burden of proving that the information is exempt
21 from disclosure. Based on the Court’s preliminary review, it appears that the government has
22 not met its burden in many instances; instead, the government has applied the exemptions
23 broadly and without providing a detailed explanation of why the withheld material is exempt.
24 A few examples of the government’s liberal application of the exemptions are discussed
25 below.

26 A. Exemption 3

27 FOIA Exemption 3 provides that FOIA “does not apply to matters that are –
28 specifically exempted from disclosure by statute . . . provided that such statute (A) requires

1 that the matters be withheld from the public in such a manner as so to leave no discretion on
2 the issue, or (B) establishes particular criteria for withholding or refers to particular types of
3 matters to be withheld.” 5 U.S.C. §552(b)(3). “A two-part inquiry determines whether
4 Exemption 3 applies to a given case.” Minier, 88 F.3d at 801. “First, a court must determine
5 whether there is a statute within the scope of Exemption 3. Then, it must determine whether
6 the requested information falls within the scope of the statute.” Id.

7 Defendants claim that certain records are exempt pursuant to 49 U.S.C. section 114(s)
8 and 49 U.S.C. section 40119(b). These statutes provide that notwithstanding FOIA, the TSA
9 shall develop regulations “prohibiting the disclosure of information obtained or developed in
10 carrying out security” if disclosing the information would “be detrimental to the security of
11 transportation.” There is no dispute that these statutes fall within Exemption 3. The
12 question, then, is whether the withheld information falls within the regulations adopted
13 pursuant to these statutes.

14 Some information is redacted pursuant to 49 C.F.R. section 1520.7(b). That
15 regulation identifies “Security Directives and Information Circulars . . . , and any comments,
16 instructions, or implementing guidance pertaining thereto” as sensitive security information
17 that cannot be disclosed. The TSA revealed to plaintiffs a slide presentation that the TSA
18 prepared in December 2002 to brief the FBI on a proposed policy that the TSA was in the
19 process of developing. TSA Nos. 1-8. The TSA has redacted certain information, claiming
20 it is covered by section 1520.7(b). Some of the redacted information on its face, however,
21 does not fall into this category; instead, defendants seem to contend that if any piece of
22 information is also in a security directive then it is sensitive security information. While
23 there may be a reason for deeming certain information in a security directive sensitive
24 security information when it appears elsewhere, it does not follow that all information that
25 appears in a security directive falls within the exemption for security directives when it
26 appears elsewhere.

27 The first slide on TSA no. 2, for example, contains information on the number of
28 persons that had been identified as “no transport” prior to September 11, 2001. None of the

1 defendants' affidavits explains how this information--historical fact--is sensitive security
2 information that should not be disclosed. Nor do they explain why the number of names on
3 the No-Fly and Selectee Lists in 2002, see TSA no. 3, is exempt. Defendants do not meet
4 their burden by simply reciting that information derived from security directives is sensitive
5 security information.

6 Other information is redacted pursuant to 49 C.F.R. section 1520.7(c) which identifies
7 "selection criteria used in any security screening process" as non-disclosable sensitive
8 security information. Some of the information redacted, however, merely recites that the
9 Watch Lists include persons who pose a threat to aviation. See TSA Nos. 2, 3, 4. While this
10 information may technically fall within the category of "selection criteria," it is by no means
11 sensitive security information; rather, it is common sense and widely known. Defendants
12 have offered no justification for withholding such innocuous information.

13 Defendants have also redacted information pursuant to section 1520.7(l), see TSA no.
14 7. This regulation, however, merely provides that "[a]ny draft, proposed, or recommended
15 change to" sensitive security information is not protected. The redacted information is not a
16 draft or proposed or recommended change.

17 **B. Exemption 7(C)**

18 Exemption 7(C) provides that materials may be withheld by an agency if they are
19 "records or information compiled for law enforcement purposes, but only to the extent that
20 production of such law enforcement records or information . . . (C) could reasonably be
21 expected to constitute an unwarranted invasion of privacy." 5 U.S.C. § 552(b)(7)(C).

22 Because the FBI has a clear law enforcement mandate, it need only establish a "rational
23 nexus" between enforcement of federal law and the document for which Exemption 7 is
24 claimed. See Rosenfeld v. U.S. State Dept. of Justice, 57 F.3d 803, 808 (9th Cir. 1995).

25 Defendants have applied this Exemption too broadly as well. For example, Ann
26 Davis, a reporter for the Wall Street Journal, sent an FBI employee an email detailing the
27 complaints of several American peace activists (including the individual plaintiffs) who
28 claim they were told they were on a No-Fly List. Defendants have redacted all of the

1 information summarizing the complaints of the activists on the ground that the information
2 falls within Exemption 7(C). Defendants have not met their burden for two reasons.

3 First, defendants have not established that there is any nexus between this information
4 and the enforcement of federal law. The government merely states that “it is not at all clear
5 why plaintiffs’ [sic] believe the letter was ‘compiled’ by the FBI for some purpose other than
6 ensuring the accuracy of the No Fly List.” Amended Opp. at 26. The burden is on the
7 government to show that the information--that is, the email from the Wall Street Journal
8 reporter--was received for a law enforcement purpose; the burden is not on the plaintiffs to
9 show that it was not. None of the government’s affidavits suggest that the email has a
10 rational nexus to enforcement of federal law. In fact, the unredacted portions of the email
11 demonstrate that the reporter was making an inquiry of the FBI because she was working on
12 a story and wanted to know if the activists were on the list: “Since there are many possible
13 reasons why these people were stopped, it will be very helpful to hear from you and work
14 with you on this; I’ve listed contact information at the bottom of the email. . . . Thank you
15 again for being so responsive.” FBI No. 305.

16 Second, even assuming the government had established the nexus, it has not
17 demonstrated that disclosing the information in the email would involve an unwarranted
18 invasion of privacy. First, if the government was merely concerned with protecting the
19 privacy rights of the activists it could have simply redacted their names and other identifying
20 information. It did not; instead, it redacted the entire discussion of each incident. Second,
21 the email makes clear that much of the information is derived from newspaper articles and
22 other public sources. Indeed, the government has produced articles discussing some of the
23 incidents--and the name of the persons involved--elsewhere in its production. See FBI Nos.
24 66, TSA Nos. 19-21. It is unreasonable for the FBI to claim that disclosing this information
25 would be an unwarranted invasion of the privacy of the people who made the complaints
26 public in the first place, especially when the government has disclosed the information
27 elsewhere.

1 Defendants have also improperly used this privacy exemption to withhold entire
2 documents when they could have simply redacted the third party's name. See, e.g., FBI Nos.
3 2-3, 71-72, 73-74, 197, 273-276. They have also redacted nearly all references to
4 government employees, even the name of the FBI employee who was responsible for
5 responding to inquiries from the public regarding names appearing on the No Fly Lists. See
6 e.g., FBI Nos. 72, 73. Defendants have not met their burden of showing that each and every
7 name is exempt.

8 **C. Exemption 6**

9 Defendants have also misapplied FOIA Exemption 6. Exemption 6 protects
10 "personnel and medical files and similar files the disclosure of which would constitute a
11 clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6). "The Supreme Court has
12 defined 'similar file' broadly as government records containing 'information which applies to
13 a particular individual.'" Minnis v. Dept. of Agriculture, 737 F.2d 784, 786 (9th Cir. 1984)
14 (applying Exemption 6 to permit applicant list). "Exemption 6 is intended to protect
15 'individuals from the injury and embarrassment that can result from the unnecessary
16 disclosure of personal information.'" Bowen v. U.S. Food & Drug Administration, 925 F.2d
17 1225, 1228 (9th Cir. 1991) (internal citation omitted); see also Dobronski v. F.C.C., 17 F.3d
18 275 (9th Cir. 1994) (applying Exemption 6 to sick leave records); Van Bourg,
19 Allen, Weinberg & Roger v. N.L.R.B., 728 F.2d 1270, 1273 (9th Cir. 1984) (applying
20 Exemption 6 to names and addresses of employees eligible to vote for a union).

21 The TSA has withheld information pursuant to Exemption 6 that is not a personnel,
22 medical or similar file. See Nos. 19-23. For example, it has withheld the *name* of the
23 Associate Director of the TSA Legislative Affairs Office, see TSA No. 21, and the *name* of
24 the Special Assistant to the Associate Under Secretary for Security Regulation & Policy, U.S.
25 Department of Transportation from an email forwarding an Associated Press article about
26 Larry Musarra, a retired Coast Guard lieutenant commander whose name is similar to a name
27 on the No-Fly list. See TSA No. 19. The redaction of the names of these officials is
28 unjustified. First, who holds a particular office at a particular time is a matter of public

1 record; thus, the redaction makes no sense. Second, the documents from which the names
2 are redacted do not disclose personal information about the officials. The TSA even redacted
3 the message that was written along with the forwarded email, including the message that
4 Mussara “is a retired Coastie,” information that appears in the Associated Press article.

5 CONCLUSION

6 The Court’s preliminary review of the voluminous material demonstrates that in many
7 instances the government has not come close to meeting its burden, and, in some instances,
8 has made frivolous claims of exemption. The appropriate remedy is to have defendants
9 review all of the withheld material to determine whether they believe in good faith that the
10 material is in fact exempt and, if defendants contend it is exempt, to provide a detailed
11 affidavit that explains why the particular material is exempt. General statements that, for
12 example, the information is sensitive security information, are inadequate to satisfy the
13 government’s burden. That material which is not exempt shall be promptly disclosed to
14 plaintiffs in response to their FOIA request.

15 The Court has not reviewed every piece of withheld information and every claimed
16 exemption. Accordingly, that this Order does not mention a particular exemption or
17 particular piece of withheld information does not mean that the Court agrees the information
18 should be withheld. Defendants are directed to review all withheld material and reconsider
19 whether it is exempt from disclosure, keeping in mind that it is defendants’ burden to prove
20 that an exemption applies and that exemptions are to be construed narrowly.

21 Once defendants’ review is complete, and a further production has been made to
22 plaintiffs, defendants shall file a further motion for summary judgment that addresses the
23 remaining material. Defendants shall be careful to specify which exemption is being applied
24 to particular information on any given document. Defendants need not address the classified
25 material as the Court has reviewed that information *in camera* and determined that it is
26 exempt. The motion for summary judgment shall be accompanied by a certification from
27 government counsel attesting that counsel has personally reviewed all of the withheld
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1 information and in counsel's good faith opinion the withheld material is exempt from
2 disclosure.

3 The parties shall meet and confer with regard to a schedule for defendants' further
4 production and revised motion for summary judgment.

5 **IT IS SO ORDERED.**

6 Dated: June 15, 2004

7 /s/
UNITED STATES DISTRICT JUDGE
CHARLES R. BREYER